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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSE JIMENEZ,

Plaintiff,

vs.

SMITH & NEPHEW, PLC, a foreign
corporation or entity; and SMITH &
NEPHEW, INC., a Delaware corporation,

Defendants.

NO. CIV 09-416

ANSWER OF SMITH & NEPHEW, INC.

Defendant Smith & Nephew, Inc. ("Defendant") hereby answers Plaintiff's Complaint.

All allegations in the Complaint that are not specifically admitted herein are denied.

Defendant responds to the Complaint as follows:

PARTIES

1. Responding to Paragraph 1 of the Complaint, Defendant lacks sufficient information or knowledge to form a belief as to the truth or falsity of the allegations made about Plaintiff's residence and, therefore, denies the same.

2. Responding to Paragraph 2 of the Complaint, Defendant admits that Smith & Nephew, PLC is a foreign corporation; however, Defendant further responds that all orthopaedics businesses are headquartered in Memphis, Tennessee and are conducted by Smith & Nephew, Inc., therefore Smith & Nephew, PLC would not be a proper or necessary party for this lawsuit.

1 3. Responding to Paragraph 3 of the Complaint, Defendant admits that Smith &
2 Nephew, Inc. is a Delaware Corporation with headquarters in Memphis, Tennessee. Defendant
3 denies that service in this matter was proper in Dallas, Texas.

4 4. Responding to Paragraph 4 of the Complaint, Defendant denies the allegations
5 made therein.
6

7 **STATEMENT OF FACTS APPLICABLE TO ALL COUNTS**

8 5. Responding to Paragraph 5 of the Complaint, Defendant lacks sufficient
9 information or knowledge to form a belief as to the truth or falsity of the allegations made therein
10 and, therefore, denies the same. Defendant further responds that, once it has an opportunity to
11 inspect and identify the subject medical device and component parts, it will be in a better position
12 to determine whether it was designed and manufactured by Smith & Nephew.

13 6. Responding to Paragraph 6 of the Complaint, Defendant lacks sufficient
14 information or knowledge to form a belief as to the truth or falsity of the allegations made therein
15 and, therefore, denies the same.
16

17 7. Responding to Paragraph 7 of the Complaint, Defendant lacks sufficient
18 information or knowledge to form a belief as to the truth or falsity of the allegations made therein
19 and, therefore, denies the same.
20

21 8. Responding to Paragraph 8 of the Complaint, Defendant lacks sufficient
22 information or knowledge to form a belief as to the truth or falsity of the allegations made therein
23 and, therefore, denies the same.
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1 9. Responding to Paragraph 9 of the Complaint, Defendant lacks sufficient
2 information or knowledge to form a belief as to the truth or falsity of the allegations made therein
3 and, therefore, denies the same.

4
5 **COUNT ONE**

6 10. Responding to Paragraph 10 of the Complaint, Defendant re-alleges and
7 incorporates herein by reference all of its prior admissions, allegations, and denials to Paragraphs
8 1 through 9 of the Complaint as though fully set forth herein.

9 11. Responding to Paragraph 11 of the Complaint, Defendant admits the allegations
10 contained therein.

11 12. Responding to Paragraph 12 of the Complaint, Defendant lacks sufficient
12 information or knowledge to form a belief as to the truth or falsity of the allegations made therein
13 and, therefore, denies the same.

14 13. Responding to Paragraph 13 of the Complaint, Defendant denies the allegations
15 made therein.

16 14. Responding to Paragraph 14 of the Complaint, Defendant lacks sufficient
17 information or knowledge to form a belief as to the truth or falsity of the allegations made therein
18 and, therefore, denies the same.

19 15. Responding to Paragraph 15 of the Complaint, Defendant denies the allegations
20 made therein.

COUNT TWO

16. Responding to Paragraph 16 of the Complaint, Defendant re-alleges and incorporates herein by reference all of its prior admissions, allegations, and denials to Paragraphs 1 through 15 of the Complaint as though fully set forth herein.

17. Responding to Paragraph 17 of the Complaint, Defendant re-alleges and incorporates herein by reference all of its prior admissions, allegations, and denials to Count One of the Complaint as though fully set forth herein.

18. Responding to Paragraph 18 of the Complaint, Defendant admits that it in 2003 it designed and manufactured orthopedic devices for implantation in the human body including the knee. Defendant denies the remaining allegations in this paragraph of the Complaint.

19. Responding to Paragraph 19 of the Complaint, denies the allegations contained therein.

20. Responding to Paragraph 20 of the Complaint, denies the allegations contained therein.

21. Responding to Paragraph 21 of the Complaint, Defendant denies the allegations contained therein.

22. Responding to Paragraph 22 of the Complaint, Defendant denies the allegations contained therein.

23. Responding to Paragraph 23 of the Complaint, Defendant denies the allegations contained therein.

COUNT THREE

24. Responding to Paragraph 24 of the Complaint, Defendant re-alleges and incorporates herein by reference all of its prior admissions, allegations, and denials to Paragraphs 1 through 23 of the Complaint as though fully set forth herein.

25. Responding to Paragraph 25 of the Complaint, Defendant re-alleges and incorporates herein by reference all of its prior admissions, allegations, and denials to Count One and Count Two of the Complaint as though fully set forth herein.

26. Responding to Paragraph 26 of the Complaint, Defendant denies the allegations contained therein.

27. Responding to Paragraph 27 of the Complaint, Defendant denies the allegations contained therein.

28. Responding to Paragraph 28 of the Complaint, Defendant denies the allegations contained therein.

29. Responding to Paragraph 29 of the Complaint, Defendant lacks sufficient information or knowledge to form a belief as to the truth or falsity of the allegations made therein and, therefore, denies the same.

30. Responding to Paragraph 30 of the Complaint, Defendant denies the allegations contained therein.

COUNT FOUR

31. Responding to Paragraph 31 of the Complaint, Defendant re-alleges and incorporates herein by reference all of its prior admissions, allegations, and denials to Paragraphs 1 through 30 of the Complaint as though fully set forth herein.

34. Responding to Paragraph 34 of the Complaint, Defendant denies the allegations contained therein.

36. Responding to Paragraph 36 of the Complaint, Defendant denies the allegations contained therein.

37. Responding to Paragraph 37 of the Complaint, Defendant re-alleges and incorporates herein by reference all of its prior admissions, allegations, and denials to Paragraphs 1 through 36 of the Complaint as though fully set forth herein.

38. Responding to Paragraph 38 of the Complaint, Defendant admits that it in 2003 it designed and manufactured orthopedic devices for implantation in the human body including the knee. Defendant denies the remaining allegations in this paragraph.

39. Responding to Paragraph 39 of the Complaint, Defendant believes this paragraph calls for a legal conclusion that requires no responsive pleading. To the extent a response may be required, Defendant denies the allegations in this paragraph.

1 40. Responding to Paragraph 40 of the Complaint, Defendant denies the allegations
2 contained therein.

3 41. Responding to Paragraph 41 of the Complaint, Defendant denies the allegations
4 contained therein.

5 42. Responding to Paragraph 42 of the Complaint, Defendant believes this paragraph
6 calls for a legal conclusion that requires no responsive pleading. To the extent a response may be
7 required, Defendant denies the allegations in this paragraph.
8

9 **DAMAGES APPLICABLE TO ALL COUNTS**

10 43. Responding to Paragraph 43 of the Complaint, Defendant re-alleges and
11 incorporates herein by reference all of its prior admissions, allegations, and denials to Paragraphs
12 1 through 42 of the Complaint as though fully set forth herein.
13

14 44. Responding to Paragraph 44 of the Complaint, Defendant re-alleges and
15 incorporates herein by reference all of its prior admissions, allegations, and denials to Count One
16 through Count Five of the Complaint as though fully set forth herein.

17 45. Responding to Paragraph 45 of the Complaint, Defendant denies the allegations
18 contained therein.

19 **JURY REQUEST**

20 46. Responding to Paragraph 49¹ of the Complaint, Defendant also requests a jury trial
21 in this matter.
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26 ¹ Due to an apparent clerical error, Plaintiff's Complaint does not contain paragraphs 46, 47 or 48.

1 **RESPONSE TO PLAINTIFF’S “PRAYER”**

2 47. In the paragraph identified in the Complaint as the “Prayer”, Plaintiff requests
3 certain relief under Texas law. Defendant specifically denies that the law of Texas should apply
4 to any part of this matter.
5

6 **AFFIRMATIVE DEFENSES**

7 **FIRST AFFIRMATIVE DEFENSE**

8 Plaintiff’s alleged damages were the result of an intervening, superseding cause, thus
9 relieving Defendant of any liability.
10

11 **SECOND AFFIRMATIVE DEFENSE**

12 The plans and designs for the product and the methods and techniques of manufacturing,
13 inspecting, testing and labeling the subject product, if manufactured by Defendant conformed
14 with the state of the art at the time it was first sold by Defendant.
15

16 **THIRD AFFIRMATIVE DEFENSE**

17 If the product at issue in this case was manufactured by Defendant, the proximate cause of
18 the incident giving rise to this action was an alteration or modification of the subject product,
19 which was not reasonably foreseeable, and was made by a person or persons other than Defendant
20 and subsequent to the time that the subject product was originally sold by Defendant.
21

22 **FOURTH AFFIRMATIVE DEFENSE**

23 If the product at issue in this case was manufactured by Defendant, the proximate cause of
24 the incident giving rise to this action was the use of the product for a purpose, in a manner, or in
25 an activity other than which was reasonably foreseeable, or was contrary to an express or
26

1 adequate warning appearing on, attached to, or delivered with the subject product, any person
2 operating the subject product knew or with exercise of reasonable and diligent care should have
3 known of such instructions or warnings.

4
5 **FIFTH AFFIRMATIVE DEFENSE**

6 There was a lack of privity between Plaintiff and Defendant.

7 **SIXTH AFFIRMATIVE DEFENSE**

8 Pursuant to UJI 13-2219 NMRA 2006, Defendant alleges that a person or entity not a
9 party to this action was wholly or partially at fault in causing the alleged accident and the injuries
10 and/or damages for which Plaintiff seeks recovery.

11 **SEVENTH AFFIRMATIVE DEFENSE**

12 Defendant alleges that Plaintiff and unnamed persons or entities were wholly or partially
13 at fault in causing the alleged accident, thereby reducing or eliminating any damages owing by
14 Defendant by way of the doctrine of comparative fault.

15 **EIGHTH AFFIRMATIVE DEFENSE**

16 Defendant pleads the affirmative defenses set forth in Rules 8 and 12, Federal Rules of
17 Civil Procedure, and will seek to amend its Answer when Defendant has had an opportunity to
18 complete discovery and identify which such affirmative defenses are applicable to bar Plaintiff's
19 claims.
20

21 **NINTH AFFIRMATIVE DEFENSE**

22 Defendant alleges that it had no duty to warn of any alleged risks associated with the
23 subject product pursuant to the Learned Intermediary Doctrine.
24

25 **TENTH AFFIRMATIVE DEFENSE**

1 Defendant alleges that, even if it had a duty to warn, which allegation is expressly denied,
2 Defendant at all times fulfilled its alleged duty to warn of the alleged risks associated with the
3 subject product.

4 **ELEVENTH AFFIRMATIVE DEFENSE**

5 Defendant alleges, as to each cause of action, that, on balance and in light of the relevant
6 factors, the benefits of the design of the subject product outweighed the risk of danger, if any,
7 inherent in the design.

8 **TWELFTH AFFIRMATIVE DEFENSE**

9 Defendant alleges that the subject product performed as safely as a reasonably prudent
10 person would expect when used in an intended or reasonably foreseeable manner.

11 **THIRTEENTH AFFIRMATIVE DEFENSE**

12 Some or all of the injuries alleged in the Complaint were caused by preexisting medical
13 conditions, subsequent medical conditions, an idiosyncratic reaction, operation of nature, or act of
14 God, for which Defendant is not responsible.

15 **FOURTEENTH AFFIRMATIVE DEFENSE**

16 Plaintiff's alleged loss, damage, injury, harm, expense, diminution, or deprivation alleged,
17 if any, were caused in whole or in part by Plaintiff's failure to exercise reasonable care and
18 diligence to mitigate the alleged damages.

19 **FIFTEENTH AFFIRMATIVE DEFENSE**

20 Plaintiff's claims are barred by the applicable Statute of Limitation, including, but not
21 limited to, NMSA § 37-1-8 and NMSA § 55-2-725(1).

1 WHEREFORE, Defendant prays:

2 1. That Plaintiff take nothing by his Complaint;

3 2. That the Complaint be dismissed with prejudice and that judgment be awarded in
4 favor of Defendant;

5 3. That Defendant be awarded its costs of suit herein;

6 4. That Defendant be awarded its reasonable attorneys' fees; and

7 5. That Defendant be awarded such other and further relief as this Court deems just
8 and proper.
9

10 Respectfully submitted,

11 **RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.**

12
13 By /s/ Thomas A. Outler

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24 ***ATTORNEYS FOR DEFENDANT SMITH & NEPHEW, INC.***
25
26

CERTIFICATE OF SERVICE

I hereby certify that the above pleading was served by mail on the following counsel of record in this action on April 29, 2009:

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